

In the Matter of License No. 149076 Merchant Mariner's Document  
No. Z-659415 and all other Licenses and Documents  
Issued to: CLIFFORD E. FLACY

DECISION AND FINAL ORDER OF THE COMMANDANT  
UNITED STATES COAST GUARD

1030

CLIFFORD E. FLACY

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

By order dated 18 October 1956, an Examiner of the United States Coast Guard at Long Beach, California, suspended License No. 149076 and Merchant Mariner's Document No. Z-659415 issued to Clifford E. Flacy upon finding him guilty of inattention to duty. The three specifications allege in substance that while serving as bargeman on board the Inland Freight BARGE NO. C-1 under authority of the license above described, on or about 12 May 1956, Appellant contributed to the capsizing of BARGE C-1 by failing to close the equalizing valves on said barge (First Specification); by failing to require the equalizing valves to be closed during cargo discharging operations on the barge (Second Specification); and by failing to exercise due caution during cargo handling operations.

At the hearing, Appellant was given a full explanation of the nature of the proceedings and the rights to which he was entitled. Appellant was represented by counsel of his own choice and he entered a plea of "not guilty" to the charge and each specification proffered against him.

The Investigating Officer made his opening statement. He then introduced in evidence the testimony of three witnesses and a purported diagram of the valve and piping arrangement on the BARGE C-1.

After the Investigating Officer had rested his case, counsel for Appellant made a motion to dismiss on the grounds that the Coast Guard did not have jurisdiction and there was a lack of proof on the merits of the case. The Examiner heard argument on the motion and then denied it.

In defense, Appellant offered in evidence his testimony and that of two other witnesses. Appellant stated that when trouble developed with the starboard engine, he secured that engine and

commenced pumping from the Nos. 1 and 2 tank port and starboard on the port engine before the barge commenced to list to starboard; he partially and then completely closed the suction valves to the Nos. 1 and 2 port tanks as the list increased; Appellant thought the hand wheels on the rods leading to the equalizer valves had been removed; he did not check the center line valves because he did not know what they were for; the barge capsized 20 minutes after it started to list.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel and given both parties an opportunity to submit proposed findings and conclusions, the Examiner announced his decision and concluded that the charge and three specifications had been proved. He then entered the order suspending Appellant's License No. 149076, Merchant Mariner's Document No. Z-659415, and all other licenses and documents issued to Appellant by the United States Coast Guard or its predecessor authority, for a period of three months.

Based upon my examination of the record submitted, I hereby make the following

#### FINDINGS OF FACT

On 12 May 1956, Appellant was serving as bargeman in charge of the uninspected molasses barge, Inland Freight BARGE NO. C-1, when the barge capsized in the Los Angeles Harbor area while discharging a cargo of molasses.

BARGE C-1 was formerly an inspected oil barge. It was purchased by the United Towing Company and used exclusively as a molasses carrier after February 1956. In this capacity, it was operated as an uninspected barge which was not required by law to have a certificated tankerman on board as had been required previously.

All other barges owned by the United Towing Company were inspected oil barges which were required to have a certificated tankerman in charge. Appellant had been an employee of this company for about three and a half or four years. He was originally employed as a deck hand; but his regular employment with the company for some time prior to this casualty consisted of serving as a tankerman in charge of loading and discharging operations on the company's inspected oil barges. By virtue of Appellant's Third Assistant Engineer's License No. 149076, which was issued to him on 22 October 1952, he was entitled to serve as a tankerman on inspected vessels required to have a certificated tankerman. 46 CFR 12.20-1(c).

Appellant had been ordered to take charge of the company's only uninspected barge, the molasses BARGE C-1, on three or four occasions prior to 12 May 1956. On the latter date, Appellant was assisted by a deck hand. Since Appellant's employment in charge of BARGE C-1, resulted directly from the fact that he was a regular employee of the company as a certificated tankerman on its inspected oil barges of the same general construction as the BARGE C-1, Appellant was acting under the authority of his Third Assistant Engineer's License on 12 May 1956.

BARGE C-1 is approximately 158 feet long and has a beam of 40 feet. The barge has seven cargo tanks, a bow tank forward and three pairs of port and starboard tanks numbered aft from the bow tank. There is a center line longitudinal bulkhead dividing the port and starboard tanks with appropriate transverse bulkheads. There are two diesel engines with pumps which are used for discharging cargo. These pumps are located back aft under the deckhouse and either engine can be used to pump from either or both sides. There is a starboard fore and aft suction line and a port suction line both of which are ten inch lines extending along the bottom of the tanks. Near the aft end of each of the numbers 1, 2 and 3 tanks, there is crossover line between the starboard and port main suction lines. These crossover lines extend beyond the main suction lines on each side and the right-hand suction valves for the tanks on each side are located on these extensions going into the tanks. These six valves are controlled on the upper deck by hand wheels at the end of rods leading from the valves to the deck. The suction valve rods are outboard on both sides of the barge, at each pair of tanks, with respect to other valve rods. At the time of the incident in question, the six port and starboard suction valve rods had hand wheels on them. Three other valve rods, near the center line of the barge at each of the three pairs of tanks, had hand wheels on them. These valve rods were between and in line with the port and starboard suction valve rods at each tank. Consequently, they were also located over the crossover lines between the port and starboard tanks. The record is not clear as to whether these three rods led to valves on the crossover lines or were attached to equalizer valves set in the transverse bulkheads for the purpose of permitting the cargo to flow through the bulkhead between the port and starboard tanks in each pair of tanks. There were also valve rods on deck, in the vicinity of the three at each tank with hand wheels, that did not have hand wheels. Hence, the valves which these rods controlled could not be readily opened or closed by hand.

On 12 May 1956, appellant loaded the barge with molasses and it was moved to another berth to discharge the cargo. The hose was connected and both engines were utilized to pump from both the port and starboard number 1 tanks. Trouble developed with the starboard

engine and it was secured. the port engine continued to pump from both sides and Appellant opened the suction valves to the number 2 port and starboard tanks. In approximately two minutes, Appellant noticed a list to starboard. He partially closed the suction valves to the numbers 1 and 2 port tanks. When the list was not corrected by this action, Appellant closed the valves to the two port tanks intending to pump only from the starboard tanks in order to lighten that side and get the barge back on an even keel. Appellant did not at any time check the valve rods on deck near the center line. These rods had hand wheels but Appellant did not know what valves these rods controlled and he did not know what position the wheels were in on this date. He assumed that the rods leading to the equalizer valves were some of those which could not be operated by hand because they did not have hand wheels on them.

the list was between five and eight degrees when Appellant completely closed the port suction valves. As he continued to attempt to pump from only the numbers 1 and 2 starboard tanks, the list increased. The tug alongside of the barge stood clear and Appellant attempted to dog the doors to the deckhouse but was unable to do so. About 15 minutes after the port tanks were shut down completely and 20 minutes after Appellant noticed the initial list, the barge rolled over to starboard. The damage to the barge was estimated at \$8,000 and the cargo loss amounted to more than \$25,000.

Later investigation indicated that the barge was not caused to capsize by any breaks or leaks in the bulkheads, sides or bottom of the barge.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant contends that the Coast Guard does not have jurisdiction in this proceeding since Appellant was not acting under the authority of his license. BARGE C-1 was an uninspected vessel and, as such, was not required as a matter of law to have a crew member with a tankerman's certificate or the equivalent. Also, there was no company policy with respect to whether Appellant's employer as a private condition of employment, required those in charge of uninspected barges to have licenses or tankerman certificates. Hence, Appellant was not required, in either case, to have a tankerman certificate or the equivalent as a condition of employment on BARGE C-1.

With respect to the First and Second Specifications, there is no evidence to show that the equalizer valves were open when the barge capsized. Even if these valves were open, there is no proof that this condition contributed to the capsizing of the barge.

For the reasons given above, it is submitted that the decision of the Examiner is in error and should be reversed.

APPEARANCE:     Bodel and Fogel of Los Angeles, California, by  
                  Daniel Fogel, Esquire, of Counsel.

#### OPINION

On the basis of the testimony of Mr. Orwig, the superintendent of the United Towing Company in the Los Angeles area, it seems apparent that Appellant was, in fact, serving on BARGE C-1 by virtue of his having a Third Assistant Engineer's license even though there was no legal requirement that a qualified tankerman should be in charge of this uninspected barge. It is clear from Mr. Orwig's testimony that the person in charge of BARGE C-1 was required to be familiar with the operation of oil barges and that evidence of this type of experience was required in the form of a tankerman's certificate or the equivalent (R.9). This practice of the company is logical in view of the fact that this barge had formerly been used as an oil barge and, therefore, its operation required the presence of a person with the experience of a qualified tankerman. Since this was the practice of the company with respect to the molasses barge, it does not seem important to the issue that there was no specific policy, one way or the other, stating whether the United Towing Company required those in charge of its uninspected barge to have a license or certificate (R.26). The only other person who testified that he had been placed in charge of BARGE C-1 on several occasions was a certificated tankerman. Hence, it is my opinion that it was a condition of Appellant's employment in charge of BARGE C-1 that he have a license or certificate to serve as a tankerman. Consequently, appellant was acting under the authority of his license and the Coast Guard had jurisdiction to proceed under R.S. 4450, as amended (46 U.S.C. 239).

On the merits of the case, I am inclined to agree with Appellant's contention that the First and Second Specifications should be dismissed on the ground of lack of proof that the equalizer valves were left open by Appellant when he should have closed them. There is conflicting testimony as to whether the valves controlled by the three rods on deck, located between the port and starboard rods leading to the suction valves for the three pairs of tanks, were the equalizer valves or valves in the crossover lines between the port and starboard main suction lines. The accuracy of the diagram in evidence seems somewhat questionable and, consequently, it does not help to reconcile this conflict. For these reasons, the conclusions that the First and Second Specifications were proved are reversed.

The Third Specification alleges that Appellant contributed to the capsizing of the barge by failing to exercise due caution during cargo handling operations. While it was admitted by Superintendent Orwig that Appellant was not given any instructions about the system of valves on BARGE C-1, the fact remains that it was Appellant's duty to know what valves were controlled by the valve rods on deck since he was employed for the purpose of taking charge of the loading and discharging operations. Appellant frankly admitted that he was not familiar with the arrangement of the valves on the barge. Nevertheless, it is not established that Appellant could have prevented the capsizing of the barge when the situation became noticeably serious due to the starboard list which continued to increase after Appellant acted prudently by closing the valves to the port tanks. The list was between five and eight degrees when the port suction valves were completely closed. It is quite possible that as a result of such factors as the density of molasses, the loaded condition of the barge and the slowness with which the thick molasses was shifting, no action by Appellant could have prevented the capsizing of the barge after it had heeled a few degrees to starboard. If Appellant had secured both engines, the list would still have increased, due to the lag brought about by the viscosity of the molasses, whether the equalizer valves were opened or closed.

Under these circumstances, it is my opinion that the evidence does not sustain the allegation that Appellant failed to exercise due caution, and the conclusion that the Third Specification was proved is also reversed.

#### ORDER

The charge of inattention to duty and the three specifications are dismissed. The order of the Examiner dated at Long Beach, California, on 18 October 1956, Is VACATED.

J. A. Hirshfield  
Rear Admiral, United States Coast Guard  
Acting Commandant

Dated at Washington, D. C., this 23rd day of April, 1958.